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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/605,816	10/29/2003	Richard L. Botteri		2815

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EXAMINER

PRATT, HELEN F

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 04/25/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 10/605,816	Applicant(s) BOTTERI ET AL.	
	Examiner Helen F. Pratt	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-13 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-13 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date ____. | 6) <input type="checkbox"/> Other: ____. |

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1, 3, 4 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1 is indefinite in the use of the phrase "an isotonic sports beverage and sports beverage concentrate". The composition cannot be both at the same time. Also, independent claims should start with "A" and not "the". "The" means that there is antecedent basis for the limitations of the claim. For instance claim 1 is an independent claim.

Claims 3 and 4 recite the limitation "the carbohydrate" in line 1. There is insufficient antecedent basis for this limitation in the claims.

Claim Objections

Claims 10 and 11 are objected to because of the following informalities: no period is seen at the end of each claim. Appropriate correction is required.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and

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the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1-^{9, 11}~~10~~ are rejected under 35 U.S.C. 103(a) as being unpatentable over Kampinga et al (6,596,702) or Oku et al. (2004/0209841 A1).

Kampinga et al. disclose an isotonic sports beverage, which contains glucose, vitamins and minerals as in claims 1 and 5 and artificial flavors and color as in claim 11 (col. 4, lines 54-70, col. 5, lines 1-7, col. 7, lines 5-15, 30-35,). Oku discloses an isotonic beverage containing fructose-glucose syrup, trehalose, citric acid, salt and calcium lactate and water (page 22, para. 0231). Claim 1 differs from the references in the particular minerals such as calcium and iron and B vitamins and in the intended use of providing an energy source for female and teenage athletes who are at risk for particular deficiencies. However, the Kampinga et al. discloses the use of calcium pantothenate and also states that it is not limited to particular minerals. Also, it is well known that people who are anemic should take iron, and that calcium is required for osteoporosis. One has only to look at the USDA Tables to see what levels of vitamins

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and minerals are required for each age group. Therefore, it would have been obvious to supplement a sports beverage with required vitamins and minerals.

Claim 2 further requires that the composition can be used before, during or after periods of physical activity. However, as the composition has been shown, it is seen that it could be used as claimed.

Claim 3 further requires that the carbohydrate source is 14 grams. The reference to Kampinga et al. disclose the use of glucose as in claim 4 in amounts sufficient along with trehalose to make an isotonic beverage (col. 7, lines 5-15). The reference discloses that glucose is the sugar of choice in the prior art (col. 1, lines 25-70). Therefore, it would have been obvious to use particular amounts of glucose or a carbohydrate in amounts in order to produce an isotonic beverage.

Claim 5 further requires the use of high fructose corn syrup solids (HFCS). The reference to Kampinga et al disclose the use of fructose (col. 7, lines 10-15). HFCS are a well-known source of fructose and nothing new is seen in its use. Oku discloses the use of fructose glucose syrup. Therefore, it would have been obvious to use known sources of fructose for their known function.

Claim 6 further requires particular amounts of electrolytes, which are sodium chloride and potassium chloride and small amounts of preservatives. The reference to Kampinga et al. disclose in the Prior Art section that it was known to use salts and minerals to replace electrolytes (col. 1, lines 35-45). The particular amounts are seen as being within the skill of the ordinary worker depending on what is lost during exercise. Also, Oku discloses the use of sodium citrate and chloride and

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monopotassium phosphate (page 22, para. 0233). Nothing new is seen in using known preservative in a beverage. Therefore, it would have been obvious to use known electrolytes in particular amounts and preservatives in a beverage.

Claim 7 further requires vitamin C, calcium, B complex, and vitamin D in particular amounts, claim 8 further requires particular amounts for a 1200 mg serving and claim 9 requires enough vitamin D for 10% of a 200 iu serving. However, nothing new is seen in the use of particular amounts of ingredients. As above particular amounts of vitamins are known as provided by the United States Dept. of Agriculture who has provided that information for many years. The discovery of an optimum value of a result effective variable is ordinarily within the skill of the art. In re Boesch, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980). In developing a beverage product, properties such as fortification and the amount of energy providing ingredients are important. It appears that the precise ingredients as well as their proportions affect the degree of fortification and the amount of energy provided by the product, and thus are result effective variables which one of ordinary skill in the art would routinely optimize. Therefore, it would have been obvious to use known amounts in the claimed composition.

Natural or artificial colors and flavors and preservatives are disclosed by Kampinga as in claims 6 and 11 (col. 5, lines 1-6).

Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over the above combined references as applied to the above claims, and further in view of Elseviers (6,296,892 B1) and Stillman (US 2003/0064104 A1).

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Claim 10 further requires an oligofructose. The reference to Elseviers et al. disclose that it is known to use an oligofructose in an isotonic beverage (abstract). Stillman discloses that it is known to use inulin (an oligofructose) in beverages (page 34, para. 0689). Therefore, it would have been obvious to use a known fiber in the beverage of the combined references.

Claims 12 and 13 further require that the concentrate be in syrup form and claim 13 that it is a premix. Kampinga et al. disclose the use of a tablet or powder suitable for mixing with water, and a concentrate (col. 5, lines 25-31, col. 7, lines 45-50). A concentrate is generally in syrup form as in claim 12 since water has been removed from the composition.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should

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you have questions on access to the Private PAIR system, contact the Electronic

Business Center (EBC) at 866-217-9197 (toll-free).

Hp 4-20-06

Helen Pratt
Primary Examiner